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Nos. 95-1672 and 95-1881

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Respondents have taken the position that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. Sec. 362(a), do not apply here, because the FCC is enforcing its police or regulatory power, so its action

comes within the exceptions to the stay provisions in 11 U.S.C. Sec. 362(b)(4). However, Respondents mischaracterize the character of the relief Petitioner seeks and in so doing miss the point of the Petition for a Writ of *Certiorari* ("Petition"). Their erroneous approach highlights the violence that the FCC has done to established bankruptcy principles mandated by both Congress and the courts and underscores why an important federal question is at stake that requires disposition by this Court.

The Enforcement Power of the FCC Has Already Been Exercised in This Case and Will Not Be Undermined by a Grant of Relief.

The basic point of the Petition is that the enforcement power of the FCC has already been exercised in this case; and granting the relief requested by the Petitioner, a Trustee in Bankruptcy, under *Second Thursday Corporation*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970), will not undermine that exercise of power or undo any action the Commission has taken to protect the public interest. The FCC found that Black Television Workshop of Los Angeles, Inc. ("BTW") is not qualified to operate KEEF-TV in Los Angeles. If this case is remanded to the FCC for disposition consistent with bankruptcy law, it will not result in BTW operating KEEF-TV or holding any FCC authorization.

There are various ways in which the FCC may deal with the estate of the debtor on remand. However, the cardinal principal under *Second Thursday* is that those who have been found by the FCC to be unqualified shall receive no benefit from the ultimate disposition of the authorization. Only innocent creditors may benefit, and the FCC decides who is or is not "innocent." Thus under *Second Thursday*, (a) BTW cannot end up holding a license

or operating the television station, and (b) none of the principals of BTW whose actions led to revocation by the FCC may receive any financial benefit from the ultimate disposition of the authorization.[1] The Trustee does not quarrel with that result.

In other words, the only people who have anything at stake at this point are the innocent creditors of BTW, who stand to lose millions of dollars and whose interests have been wrongly ignored by the FCC. These creditors did nothing wrong, so there is nothing to be enforced against them. Thus no interest of the Government in preserving its enforcement powers is at stake.[2]

The bankruptcy laws have two important purposes. One is to relieve debtors of some of the consequences which might otherwise result from their inability to pay their debts -- to give them a "breathing spell."[3] The other is to salvage something for creditors from the debtor's estate. The Respondents are acting in violation of the intent of Congress with respect to innocent creditors, without the countervailing public policy considerations that the Respondents argue exist, because no one is seeking restoration of the license for KEEF-TV to either BTW or its principals. This Court must not permit such a result.

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[1] Even if the Conditional Cross-Petition for a Writ of *Certiorari* ("Cross-Petition") by Rosa Ware *et al.* is granted, neither BTW or its principals will hold the license or operate KEEF-TV, as the Cross-Petitioners do not seek that relief. Cross-Petition at p. 12.

[2] How value may be realized from the property of the bankruptcy estate without BTW or its principals holding a license or operating the television station is discussed *infra*.

[3] *See* legislative history cited in Respondents' Brief in Opposition at p. 4.

The Grant of Relief in This Case Will Not Result in the Creation of a Private Property Interest in a License and Need Not Generate Any Benefit for BTW or Its Principals.

A secondary aspect of the Respondents' argument is that there is no estate of the debtor that can yield funds for the benefit of creditors, because recognizing such an estate would violate the principle that no one may have a property interest in an FCC license. It is not necessary to find that the debtor has a private property interest in its authorization that can be asserted against the Government generally, in violation of 47 U.S.C. Sec. 301, for the Court to find that the FCC has violated important bankruptcy law precepts in this case. Moreover, as discussed *infra*, the there are many situations in which certain limited property interests in broadcasting stations have been recognized without violating 47 U.S.C. Sec. 301.

Substantial funds may be realized from the bankruptcy estate (a) without giving anything to BTW or its principals, and thus without recognizing any general property interest of theirs, and (b) indeed even without ever establishing the television station that BTW sought to build in Los Angeles. For example, the authorization for KEEF-TV may be assigned to a completely new party, in which neither BTW nor its principals have any interest, in return for a cash payment to the bankruptcy court to be distributed exclusively to innocent, FCC-approved creditors. Alternatively, it is even possible to obtain cash from a third party in return simply for exchanging frequencies with BTW (again subject to FCC approval) thereby transferring only BTW's frequency to a third party while deleting the KEEF-TV station authorization altogether.

The Court need not dictate which result obtains. The point is that Respondents have ignored all the possibilities in refusing to accept a *Second Thursday*

disposition. In other words, the only issue in this case arising from the Trustee's Petition is whether or not innocent creditors should be deprived of any recovery at all, not whether BTW or its principals should recover anything or be granted any property interest or whether the FCC's findings against them should be vacated. Thus a fundamental precept of the bankruptcy law is being violated without any offsetting benefit or the creation of any property right with adverse consequences in other contexts.

Respondents Have Misapplied Case Law and Have Improperly Distinguished Cases cited by Petitioner.

The cases cited by Respondents do not support their arguments, because their arguments are based on a faulty perception of the legal nature of the relief sought by the Petitioner/Trustee. Respondents further ignore, and fail to distinguish, the teaching of *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), which indicates that the FCC is in fact legally bound to consider the rights of creditors under federal bankruptcy law, something it has failed to do here. When the facts are put in perspective, and it is understood that the FCC's disqualification findings against BTW and its principals need not be vacated or undermined for relief to be granted here,[4] BTW may remain disqualified, and the FCC's regulatory laws and regulations will remain fully enforced. However, purely innocent parties will receive at least some relief. Therefore, the decisions cited by

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[4] *La Rose* involved a situation similar to the instant one, where a licensee and its principals were found disqualified, but court-ordered relief was still provided for creditors without undermining the importance or precedential effect of the FCC's findings and conclusions in the case. Moreover, as is the case here, the court intervened after the FCC had completed its proceedings and rendered an adverse decision against the licensee.

Petitioner are relevant, and Respondents' attempt to distinguish them based on an argument that the FCC's enforcement power would be undermined are faulty.

Respondents' attempt to distinguish *Board of Governors of the Federal Reserve System of the U.S. v. McCorp Financial*, 592 U.S. 32 (1991) in a footnote, based on the fact that a different regulatory statute is involved, is unavailing. The direct parallel with *MCorp* would be the question of whether a bankruptcy court could stay the FCC's hearing on the revocation of BTW's construction permit if that hearing were still in progress. But the hearing has been completed, so that issue is not before the Court. All that is left is the question of whether economic value for the benefit of creditors may be realized from the bankruptcy estate, which is exactly where the Court in *MCorp* said that judicial intervention may be required and where the Court said that the bankruptcy court has jurisdiction.

The FCC Has Previously Recognized Property Interests in the Disposition of a License and Granted Other Relief To Protect Creditors in a Bankruptcy Context.

It must be noted that the FCC is acting inconsistently with its own precedents, as it has recognized that creditors may have a property interest in the proceeds of disposition of a license, even if they may not take a direct security or other property interest in the license itself. In so holding, the FCC has specifically recognized and discussed the kind of conflict among bankruptcy courts that Petitioner seeks to have the Court resolve here. *Walter O. Cheskey*, 9 FCC Rcd. 986 (Common Carrier Bur., 1994) (FCC endorses *In re Ridgely*, 139 B.R. 374 (Bkrtcy. D. Md. 1992) and rejects *Tak Communications*, 985 F.2d 916 (7 Cir. 1993)).

Further, in *Diamond Broadcasting of California, Inc.*, FCC 96-245 (slip op.), released June 17, 1996, the

Commission rescinded a forfeiture against a broadcast licensee where the license had been assigned to a receiver in bankruptcy, because "the imposition of a forfeiture in this case would impact only innocent creditors."

The FCC's recognition of creditor expectations in *Cheskey* and *Diamond*, especially where, as here, there is no impairment of the agency's enforcement power, contrasts with its disregard of the position of the Trustee and creditors in this case and significantly undermines the Respondents' position.

CONCLUSION

In light of the foregoing, it is respectfully submitted that important federal questions are presented in this case, the bankruptcy laws have been wrongly undermined by the proceedings below, there are circuit court decisions in Petitioners' favor, and prior law requires clarification and consistency which only this Court can provide. Therefore, *Certiorari* should be granted.

Respectfully submitted,

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